IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

FRIDAY, THE 9TH MARCH 2007 / 18TH PHALGUNA 1928

WP(C).No. 8514 of 2005(L)

CC.2328/2001 of ADDL.C.J.M., ERNAKULAM

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PETITIONER:

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1. NELLIKUNNAN ABDUL AZEEZ, S/O.NELLIKUNNAN MUHAMMED, DOWN HILL, MALAPPURAM.

2. NELLIKUNNAN ASHRAF, NELLIKUNNAN MUHAMMED DOWN HILL, MALAPPURAM.

BY ADV. SRI.K.SHRIHARI RAO

RESPONDENTS:

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1. S.I.CAPITAL AND FINANCIAL SERVICES LTD,. FOREIGN EXCHANGE DIVISION, IST FLOOR, ANJANA BUILDINGS, SREEKANDATH ROAD, RAVIPURAM, KOCHI 16, REPRESENTED BY ITS MANAGER JAMES VARGHESE.

2. STATE OF KERALA, REPRESENTED BY THE SECREARY, HOME DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

BY PUBLIC PROSECUTOR SRI.GIKKU JACOB
SRI.VARGHESE MYLOTH
SRI.V.EAPEN MATHAI
SMT.A.R.USHA
SMT.HELAN EARNEST

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 09/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONERS' EXHIBITS

EXT.P1: TRUE COPY OF THE SEARCH REPORT.

EXT.P2: TRUE COPY OF THE COMPLAINT C.C.NO.2328/01 ON THE FILE OF THE ADDITIONAL CHIEF JUDICIAL MAGISTRATE COURT, ERNAKULAM.

RESPONDENT'S EXHIBITS

EXT.R1: TRUE COPY OF THE BILL DATED 15.03.01.

EXT.R2: TRUE COPY OF RECORD KEPT IN THE OFFICE OF THE REGISTRAR OF COMPANIES DATED 23.01.03.

/TRUE COPY/

P.A TO JUDGE

R.BASANT, J

W.P(C).No.8514 of 2005

Dated this the 9th day of March, 2007

JUDGMENT

The petitioners are accused 3 and 4 in a prosecution under Section 138 of the N.I Act. Altogether there were 4 accused persons. 1st accused is a company. 2nd accused is the Managing Director, who had signed on behalf of the company in the cheque. Accused 3 and 4 are alleged to be the director of the company. It is alleged in para.2 and later in para.4 of the complaint that accused 3 and 4 are responsible for all action, omissions etc. done by the 1st accused company and that they are taking active part in the running of the business of the company. The complaint was filed as early as in 2001. Cognizance was taken by the learned Magistrate. The petitioners have not appeared before the learned Magistrate so far. They have come to this Court with this petition under Article 227 of the Constitution of India to quash the proceedings initiated against them.

2. The crux of the contentions is that they have ceased to be directors of the company w.e.f 20.11.1995 and in as much as they are not directors of the company on 20.11.1995, they cannot be made liable for the cheque which bears the date 16.03.2001 and its subsequent dishonour etc.

3. In support of this plea, the petitioners have produced Ext.P1 to show that they have ceased to be the directors w.e.f 20.11.1995. In these circumstances, it is contended that the petitioners can never be subjected to the trauma of facing this criminal prosecution under Section 138 read with 141 of the N.I Act. Ext.P1 is a search report issued by the Registrar of Companies in which it is mentioned that the petitioners have ceased to be the directors w.e.f 20.11.1995 and another person was appointed as the director with effect from that date.

4. The learned counsel for the respondent/complainant submits that Ext.P1 is of no worthy on which it is written as it is evident from a close scrutiny of Ext.P1 itself that this theory that the petitioners have ceased to be the directors was advanced only in a Form 32 report filed on 15.03.2004. Admittedly as seen from Ext.P1, no Audited Balance Sheet or Annual Returns were filed by the company for the period 31.03.1994 to 31.03.2004. The cheque is dated 16.03.2001 and the complaint was filed on 01.10.2001. In these circumstances, the self serving statement in Form 32 statement filed on 15.03.2004 that the petitioners have retired from the company w.e.f 20.11.1995 cannot, at any rate, persuade this Court to invoke its extraordinary inherent jurisdiction under Article 227 of the Constitution. At any rate, that is the plea which the petitioners must

be left to plead and establish in the trial which was held. The decision in **S.M.S Pharmaceuticals Ltd. v. Neeta Bhalla** [(2005) 8 SCC 89] cannot obviously has any explanation in the light of the specific averments which are seen in paragraphs 2 and 4 of the complaint. The learned counsel for the respondent/complainant alertly points out that the petitioners are only trying to camouflage the issue and mislead the Court by attempting to place reliance on Ext.P1. I find merit in this objection raised by the learned counsel for the respondent. Ext.P1 document cannot obviously deliver any advantage to the petitioners at this stage of the proceedings or entitle them to claim quashing of proceedings.

5. It is true that this Court in the order dated 07.03.2007 in W.P(C) No.35281 of 2005 has, accepting the original of Ext.P2 produced in this case, directed the quashing of proceedings under Article 227 of the Constitution. It was not brought to the notice of this Court and this Court committed the error of not appreciating the significance of the relevant entries in Ext.P1 that such Form 32 report was filed only on 15.03.2004. That obvious error committed by this Court in W.P(C) No.35281 of 2005, cannot deliver any advantage to the petitioners in this case.

6. This Crl.M.C is, in these circumstances, dismissed. It is reported that the petitioners have not appeared before the learned

Magistrate so far. They shall forthwith appear before the learned Magistrate. The learned Magistrate must take expeditious steps to secure the presence of the petitioners and ensure that the complaint is disposed of as expeditiously as possible - at any rate, within a period of 45 days from the date on which the petitioners appear before the learned Magistrate.

(R.BASANT, JUDGE)

rtr/-